No. 11794.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of Thomas C. Mills, deceased,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

Statement of Basis of Original and Appellate Jurisdiction.

This is an appeal from the final judgment [R. 25] and the findings of fact and conclusions of law [R. 20-24, incl.] entered in the above-entitled proceedings by the United States District Court for the Southern District of California, Central Division, on September 11, 1947.

Appellee contended in the District Court that that court had jurisdiction of this action under the Fair Labor Standards Act of 1938 and by the provisions of Section 24(8) of the Judicial Code (28 U. S. C., Sec. 41(8)). It is the position of appellant herein that the District Court did not have jurisdiction of this action by reason of the provisions of Section 2 of Public Law 49, 80th Congress, Chapter 52, which withdrew jurisdiction of this action from the District Court.

Mr. Mills, now deceased, worked at appellant's shipyard as an engineer both in the steam plant and the air compressor plant. He was paid for all time during his regular shift, but was not paid for one-half hour allowed for eating lunch [R. 8]. His duties in the steam plant required him to watch gauges and manipulate valves [R. 37-38]. He carried his lunch and ate it on the job [R. 39, 40, 50, 57, 94]. He had an office with a desk and a chair where he ate his lunch and at the same time watched the gauges [R. 43, 47]. In this office, he also made coffee which he had from time to time during the day [R. 48-49]. It was his understanding that he could eat his lunch during the shift, but that he would have to stay in the vicinity of the boiler at all times [R. 43, 49, 81]. This was in accordance with the customary practice of steam plant engineers [R. 71].

Mr. Mills' duties in the air compressor plant were to watch the voltage, water and oil systems of the machines [R. 76, 77]. He carried his lunch and ate it at a chair and desk from which point he could watch the operations of the machines [R. 81]. He was not required to make repairs on the machines [R. 78].

At all times during his employment, Mr. Mills worked under provisions of a Union contract [R. 85, 97]. There was no agreement between the appellant and the Union that the men should have relief while they ate their lunch [R. 85]. The Union had representatives in the shipyard at all times [R. 94]. At no time during the employment of Mr. Mills was any claim made by the Union or any of the individual employees performing work as engineers that they should be paid for an additional half hour each day [R. 98].

III.

Specification of Errors Relied Upon.

1. The Court erred in its conclusion of law [R. 23] that

> "Jurisdiction of this action is conferred upon the court by the Act and by Section 24 (8) of the Judicial Code (28 U. S. C. Sec. 41 (8).)" [Points on Appeal number 3, R. 179.]

2. The Court erred in its conclusion of law that

> "The activity engaged in by Thomas C. Mills during each of his one-half hour lunch periods for which he received no compensation was a compensable activity within the meaning of the Act, as amended by the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Chap. 52)." [R. 23, Points on Appeal number 2, R. 179.]

3. The Court erred in its conclusion of law that

> "Thomas C. Mills was employed by the defendant in the production of goods for interstate commerce and in processes and occupations necessary to such production within the meaning of the Act." [R. 23, Points on Appeal number 1, R. 179.]

4. The Court erred in failing to find that Mr. Mills did not eat his lunch each day during the shift [Points on Appeal number 6, R. 180].

IV.

Summary of Argument.

Neither appellant nor Mr. Mills were at any time engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. The cargo ships and troop transports which were being constructed at the shipyard were weapons of war and were produced for the use of the United States Navy in carrying on World War II. Such production was for naval and military use and did not constitute production of goods for commerce.

By the provisions of Section 2 of the Portal-to-Portal Act of 1947 (Title 29, U. S. C. Sec. 252), Congress relieved employers from liability and withdrew jurisdiction from the District Courts to enter any judgment based upon a claim under the Fair Labor Standards Act for any activity unless it was compensable by either an express provision of a written or a nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or by a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with the written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer. It was further provided that an activity should be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

In this action, the claim arose prior to May 14, 1947. There are no allegations in the pleadings that it was

based upon an activity compensable by an express provision of a written or nonwritten contract or by a custom or practice. Furthermore, there is no evidence in the record to support any such allegations and the Court failed to make any findings as to such facts. Therefore, the Court had no jurisdiction to make or enter a judgment in this action.

V.
Argument.

A. The Production of Ships Was for Military and Naval Use.

The Fair Labor Standards Act applies only to employees who are engaged in commerce or engaged in the production of goods for commerce. The burden of establishing such facts is placed upon the plaintiff. *Warren-Bradshaw Co. v. Hall* (1942), 317 U. S. 88. In this case, the employee was engaged solely in the production of cargo ships and troop transports for the use by the United States as weapons of war. The production of the instrumentalities of war does not constitute the production of goods for commerce. *Divins v. Hazeltine Electronics Corp.* (C. C. A. 2d, 1947), 163 F. (2d) 100.

In the *Divins* case, the Court made a distinction between war ships and cargo ships. It is our position that the distinction is not sound. Our contention is supported by the United States Supreme Court in *Northern Pacific Railway Co. v. United States* (1947), 91 Law Ed. (Adv. Ops.) 667. In this case, the Court made it clear that cargo ships as well as battleships were a military or naval

property of the United States. With reference to the procurement of ships by the United States Maritime Commission, the Court stated (91 Law Ed. p. 671):

> "But it is well known that procurement of military supplies or war materials is often handled by agencies other than the War and Navy departments. Procurement of cargo in transport vessels by the Maritime Commission is an outstanding example.
>
> "Civilian agencies may serve the armed forces or act as adjuncts to them. The Maritime Commission is a good example. The Army and Navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civilian or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving military or Naval functions."

The Court held that certain property was "military or Naval" property and that it was "moved for military or Naval" use within the meaning of Section 321(a) of the Transportation Act of 1940.

Thus, it is clear that the ships constructed by the appellant were for "military or Naval" use and that their production was not for commerce but was for "military or Naval use".

Furthermore, the definition of "goods" (Section 3(i) of the Fair Labor Standards Act, Title 29, U. S. C. Sec. 203) does not include "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." In the instant case, the appellant was at no time the owner of the goods; the materials, parts and

supplies which were fabricated into ships were at all times owned by the United States and the ships when constructed merely remained the property of the United States. The United States was the ultimate consumer and was not a producer, manufacturer or processor. The ships and materials from which they were fabricated were delivered into the actual physical possession of the United States. Therefore, the ships were not "goods" within the meaning of the Act.

B. The Application of Section 2 of the Portal-to-Portal Act.

In order to relieve employers of liability for claims accruing prior to May 14, 1947, under the Fair Labor Standards Act, Congress enacted Section 2 of the Portal-to-Portal Act (Title 29, U. S. C. Sec. 252):

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—
>
> "(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> "(2) a custom or practice in effect, at the time of such activity, at the establishment or other place

where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

The legislative history of the Act shows that Congress intended to eliminate all claims other than those based upon express contract provision or custom or practice. The relief from liability was not limited to claims for walking time and preliminary and postliminary time.

Before the whole House of Representatives, Representative Gwynne, the Chairman of the House Committee handling the bill, made the following statement with respect to the final bill which had come from the Conference Committee:

> "The first part of the bill has to do with existing portal-to-portal claims which you will recall *are defined as causes of action or claims seeking pay for activities which activities at the time they were performed were not compensable either by custom or practice in the place of employment, or by contract between the employer and the employee or his representative.*" (Emphasis added.)
>
> "The bill as it comes from the conference bans all existing claims of such character." (Cong. Rec. Vol. 93, p. 4513.)

In response to questions from Representative Pace, Mr. Gwynne stated:

> "In existing claims, the entire thing is barred, even though the so called portal-to-portal claim may arise in the middle of the day, during the hours for which the man is employed. The whole thought is that those claims are all barred, I mean as to existing claims as to activities for which the employer has not agreed to pay. . . ." (Cong. Rec. Vol. 93, p. 4514.)

Moreover, it is clear that the intent was to make no distinction between so-called productive and non-productive time. Mr. Gwynne so stated before the House:

> "I would think the words in the gentleman's amendment to distinguish between productive and nonproductive time would have a very unfortunate effect. Nonproductive time is just as compensable as purely productive time. But the distinction we have tried to make is between activities for which there was an understanding that they were to be paid by express agreement or by custom or practice." (93 Cong. Rec. p. 1621.)

It was also made clear in the Senate debates that all claims other than those based upon contract, custom or practice were eliminated.

> "Mr. Lucas. I wish to ask the Senator about the bill as it has been reported by the committee, and I have specific reference to section 2 (a) of part II. I ask him whether he believes that every conceivable claim based on any activity not compensable by contract or custom or practice, is wiped out by the bill. I am now talking about all claims over and beyond those which are set forth in the portal-to-portal suits, and I wish to know whether the bill includes such claims.
>
> "Mr. Donnell. The answer, Mr. President, is that the section to which the Senator from Illinois has referred destroys every claim under either the Fair Labor Standards Act of 1938—or perhaps I should say it provides that no employer is subject to any liability or punishment under the Fair Labor Stand-

ards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act on account of the failure of the employer to pay to an employee minimum wages or to pay an employee overtime compensation for or on account of any activities that an employee engaged in prior to the date of the enactment of the act, except those that were compensable by either contract, custom, or practice, as described in that section.

"Mr. Lucas. Then the Senator from Missouri and I are in agreement as to what this section means. In other words, any and all claims, over and above and beyond anything that has happened in these portal-to-portal suits, are also wiped out or outlawed, so to speak." (93 Cong. Rec. p. 2194.)

"Mr. Tydings. Let me put it this way: Does the bill now pending before the Senate take away from either employer or employee any rights which were given to him originally, but which we did not mean to give him, to the extent of the portal-to-portal suits as we have come to know them?"

"Mr. Donnell. . . . But the real purpose of this proposed legislation is to dispose of the existing portal-to-portal cases, and we do not see any way to do except to take the entire activities of the entire 24-hour day, and provide by law that none of them shall be compensable unless by contract or custom."

"Mr. Tydings. It is in the 'twilight zone,' so to speak where payment has not been made in prior practice, and where payment is not provided for in the contract, and therefore the question arises as to whether or not in good faith the employer and the employee assume that payment could be made under the Wages and Hours Act, in that twilight zone?

That is primarily I believe the place from which most of these suits have sprung, from the twilight zone, rather than practice or contractual obligation; and it is particularly in that twilight zone that the committee is attempting now to legislate to clear up that matter. Is that a broad statement of the situation?

"Mr. Donnell. I appreciate that one man may use an expression differently from the way another man uses it. I do not regard it as a 'twilight zone.' I should say that recognizing the grave economic problem, what we do is to undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so. In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable. Does that answer the Senator's question?

"Mr. Tydings. That pretty well answers it, because, although I take it the committee might like to have considered each case all over the country on its merits, in the nature of things it had to take action, and the fairest way it could act in the interest of employer and employee was to take the cases that came in the real category of right, and put them to one side, and in all the questionable cases, as to who was right and wrong, which were not covered by contract or were not covered by prior practice, the committee said, 'We will knock all these out, because it is impossible to run a line through all of them with exact justice.'

"Mr. Donnell. I think the Senator has very clearly stated the situation. . . ." (93 Cong. Rec. pp. 2196-2197.)

The statement accompanying the Conference Report bears out these observations and makes it clear that claims for activities during the middle of the day or lunch period may be wiped out.

"Clarifying Provisions

"The conference agreement (section 2 (b)) contains a provision not stated expressly in either bill, that an activity shall be considered as compensable under the above referred to contract provision or custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable. Under this provision, for example, if under the contract provision or custom or practice an activity was compensable only when engaged in between 8 and 5 o'clock but was not compensable when engaged in before 8 or after 5 o'clock, it will not be considered as a compensable activity when engaged in before 8 or after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable when engaged in before 8 but was not compensable when engaged in after 5 o'clock, it will not be compensable under the bill as agreed to in conference when engaged in after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable during a certain portion of the regular workday but was not compensable when engaged in during other hours of the regular workday, it will not be compensable under the bill as agreed to in conference when engaged in during such other hours." (93 Cong. Rec. p. 4371.)

The Wage and Hour Administrator has recognized this intent:

"the provisions of section 2 (a) (b) of the Portal Act differ from the corresponding provisions of section 4,

> relating to future claims, in that their scope is not confined to activities engaged in outside the workday proper, but extends to such activities engaged in at any time during the 24 hours of the day." (12 Fed. Reg. 7667.)

In this case, the evidence establishes that there was no custom or practice to pay for one-half hour during the shift allowed for lunch. Furthermore, there is no evidence of any *"express provision"* of contract making such time compensable. Compensability for an activity can not be implied. As pointed out in the statement accompanying the Conference Report with reference to Section 2(c):

> "This provision is in the nature of a clarifying statement . . . to make it clear that only such time will be counted for the purposes of applying the minimum wage and overtime compensation provisions of the three acts, and that it therefore will not be possible by judicial or administrative interpretation to include other time which was not made compensable under the rules above stated." (93 Cong. Rec. p. 4371.)

The District Court obviously attempted to make a distinction between so-called productive and nonproductive work [R. 18]. Congress, as pointed out, did not make any such distinction. The Conference Report shows that Congress did not intend that the courts should imply that activities are compensable as the District Court has done in this case. Moreover, the evidence does not support such implication. The engineers were represented by a Union whose representatives were always in the shipyard. They made no objection to the practice of disallowing a half-hour for lunch which the engineers understood would be eaten on the job.

It is respectfully submitted that in order to establish a claim over which this Court has jurisdiction, the employee must establish the following facts: (1) that the activity is compensable by contract provision which must be express and cannot be implied; or that the activity is compensable by custom or practice; and (2) that the activity is so made compensable for the period of the day for which the claim is made.

None of the above facts has been established in this case and the Court has made no such findings of fact. Therefore, it is clear the jurisdiction of the Court has not been established.

Conclusion.

We respectfully submit that the judgment of the District Court must be reversed on the following grounds:

1. That the employee upon whose claim the action is based was at no time engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act;

2. That there is a complete lack of evidence and there is no finding of fact to support the jurisdiction of the Court inasmuch as such jurisdiction was withdrawn from the District Courts by Section 2 of the Portal-to-Portal Act except in those cases where the activity upon which the claim was based was compensable by an express contract provision or custom or practice.

Dated at Los Angeles, California, March 16, 1948.

Respectfully submitted,

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